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No. 96-331

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

MIKE MOORE, ATTORNEY GENERAL OF MISSISSIPPI,
Petitioner,

v.

DAVID INGREBRETSEN and AMERICAN CIVIL LIBERTIES UNION OF MISSISSIPPI, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Petitioner respectfully submits this Reply Brief in response to points raised in the Respondents' Brief in Opposition.

1. Respondents assert in their Brief in Opposition [1] at pp. 6-7 that certiorari is inappropriate in this case because the lower courts' determination of standing and ripeness are "factual findings" subject to deferential review under the clearly erroneous rule. This suggestion is without merit. It is fundamental that the clearly erroneous rule does not immunize a lower court's view of the controlling law from plenary consideration. As observed in *Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982),

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[1] Citations to Respondents' Brief in Opposition to certiorari will hereinafter be to "R. Opp. at ——."

> [t]he [clearly erroneous] Rule does not apply to conclusions of law. [I]f a district court's findings rest on an erroneous view of the law, they may be set aside on that basis.

In the instant matter, the lower courts refused to acknowledge or apply the "irreducible minimum" legal requirements of standing to obtain injunctive relief set forth in numerous cases of this Court. See *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982); *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 119 L.Ed.2d 351 (1992). The proper legal standards concerning standing and ripeness were ignored, and, accordingly, the clearly erroneous rule plainly does not set the tone for review.[2] Moreover, where standing is in question, this Court will independently review the record in *de novo* fashion to determine if the requirements have been met. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 230-236 (1990); *Lujan*, 119 L.Ed.2d at 364-365.

2. Respondents further claim that review is inappropriate because "parents and students" have standing to make Establishment Clause challenges to "public school prayer" statutes. R. Opp. at 7-8. While one may obvi-

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[2] There may, of course, be appellate cases in which the underlying factual findings upon which a determination of standing is made, given the proper legal standards, may turn on a clearly erroneous analysis. This, however, is not such a case.

Respondents' further suggestion that an "abuse of discretion" standard for review of preliminary injunctions should apply, R. Opp. at 7, similarly misses the mark. First, standing to obtain injunctive relief of any kind must necessarily exist at each stage of review. See *Lujan*, 119 L.Ed.2d at 365. It is a "special obligation" of the federal courts to make sure that standing exists. *FW/PBS*, 493 U.S. at 231, *quoting Allen v. Wright*, 468 U.S. 737, 750 (1984). Second, the lower courts' preliminary injunction in this case was not simply a vehicle to preserve the relative positions of the parties, but was effectively a final determination of the merits of the facial constitutionality of Chapter 609.

ously agree with the proposition that particular students may have standing to challenge school practices that in fact personally and directly affect them, and their parents may have derivative standing, mere status as a "parent" or "student", in the abstract, is *not* enough to establish standing. In *Lujan*, Justice Kennedy in concurring summarized the controlling principle:

> While it does not matter how many persons have been injured by the challenged action, the party bringing suit must show that the action injures *him in a concrete and personal way*. This requirement is not just an empty formality.

Lujan, 119 L.Ed.2d at 377 (Kennedy, J., concurring) (emphasis supplied). Absent personal, imminent, injury to the plaintiff himself, standing based on mere status as a student, parent, etc., is nothing other than a form of "citizen" standing which has been rejected by this Court on numerous occasions, *see, e.g., Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 221-223 (1974).

In this regard, the Respondents assert that such cases as *Edwards v. Aguillard*, 482 U.S. 578 (1987), *Wallace v. Jaffree*, 472 U.S. 38 (1987), and *Karen B. v. Treen*, 653 F.2d 897 (5th Cir. 1981), *aff'd*, 455 U.S. 913 (1982), are "precedent" for their claims that parents and students have a generalized form of standing and that "pre-implementation" facial challenge under the Establishment Clause are automatically ripe for review. R. Opp. at 7-8. None of those cases are "precedent" for these broad reaching assertions,[3] however, because none expressly discussed these specific issues. The Supreme Court has never considered itself bound by assumptions in previous cases or even prior *sub silentio* holdings when

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[3] Compare *Valley Forge Christian College, supra*, where the Court expressly held that the specific requirements of standing and of a concrete "case or controversy" applied to Establishment Clause challenges, just as to other constitutional litigation.

a jurisdictional issue is squarely presented in a subsequent case. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 63 n. 4 (1989). Moreover, as Circuit Judge Jones pointed out in dissent, the prayer statutes involved in such cases as *Karen B.* are materially different from Chapter 609. Pet. App. A, 18a-19a and note 9.

3. Respondents suggest in points 3 and 4 of the Brief in Opposition, R. Opp. at 8-10, that the courts below used "those tests set out by the Court for reviewing similar facial challenges to a law under the Establishment Clause," i.e. the multipartite test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), thus implying that the burden of proof considerations set forth in *United States v. Salerno*, 481 U.S. 730, 745 (1987) and *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 514 (1990), can play no part. This effort by Respondents to exclude the *Salerno/Akron Center* burden of proof from consideration is an effort to confuse apples and oranges. The burden of proof methodology utilized in a facial challenge does not replace, or substitute for, the substantive constitutional test to be employed.[4] Where a statute like Chapter 609 is challenged on its face, and thus as being "incapable of *any* valid application",[5] it is only appropriate that a heavy burden apply and that a judgment not be based upon worst case hypotheticals. Respondents do not explain how Establishment Clause cases are exempt from these considerations.

4. Respondents further suggest, rather disingenuously, that the lower courts "effectively" performed a *Salerno*

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[4] For the record, Petitioner disagrees with Respondents' suggestion that the *Lemon* test is the applicable substantive standard. Instead, of the current Establishment "tests", the school sponsorship/coercive effect analysis of *Lee v. Weisman*, —— U.S. ——, 120 L.Ed.2d 467 (1992), seems to best supply the substantive standard. See *Jones v. Clear Creek Ind. Sch. Dist.*, 977 F.2d 963, 969-972 (5th Cir. 1992), *cert. denied*, 113 S.Ct. 2950 (1993).

[5] *Village of Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 494 n. 5 (1982) (emphasis supplied).

analysis because student-initiated commencement invocations were severed from the general overriding determination of facial unconstitutionality of Chapter 609.[6] R. Opp. at 9-10. Petitioners respectfully submit that the Court of Appeals and District Court could not "effectively" perform a *Salerno* analysis while expressly holding that the *Salerno* burden did not apply to Establishment Clause cases and while relying upon a "worst case" analysis of Chapter 609. See Pet. App. A at 7a note 2; at 43a-44a. Chapter 609 is a statute that has a "manifold variety" of possible applications, 22a, with regard to a "daunting variety of activities daily undertaken," 15a; any "effective" analysis under *Salerno* and *Akron Center* would hold that Chapter 609 is not *facially* invalid.

5. Finally, with regard to Respondents' disclaimer, R. Opp. at 10-11, that the lawsuit and injunction are really benign and do not "bar the private speech of private actors" or damage what they term as "pre-existing" rights, Petitioner stands by the proposition that the injunction of Chapter 609 as unconstitutional on its face confuses and undermines the rights of third party students and is a *de facto* message of hostility to protected student religious viewpoints. This is particularly true where, as here, the expressed goal of the enjoined statute is to recognize rights provided by the "First Amendment . . . and the judicial interpretations thereof as given by the Supreme Court." Pet. App. C, 64a-65a. Respondents refuse to acknowledge that First Amendment freedoms require "breathing space to survive," *NAACP v. Button*, 371 U.S. 415, 433 (1963), and that broad injunctions which implicate First Amendment speech rights are highly disfavored, *Carroll v. President and Commissioners of Princess Anne*, 393 U.S. 175, 183-184 (1968).

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[6] Circuit Judge Jones in dissent termed this "leaving a sliver of liberty" for student-initiated graduation ceremony prayers. Pet. App. A at 13a.

Petitioner respectfully prays that the Petition for a Writ of Certiorari will be granted and that the judgment of the Court of Appeals will be summarily reversed and vacated, or that this case will be set for oral argument and full briefing.

Respectfully submitted,

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